? Legal opinion

CECC-K

MEMORANDUM FOR ALL DIVISION AND DISTRICT COUNSELS

SUBJECT: The Statute of Limitations as it Applies to Enforcement Against Unpermitted Discharges of Dredged or Fill Material

1. BACKGROUND

A recent edition of "Inside EPA" (October 14, 1994), a publication which highlights issues, trends, and "inside information" at that agency, featured an article which discussed a recent case in the U.S. Court of Appeals for the District of Columbia Circuit decided on March 4, 1994. That case was Minnesota Mining & Manufacturing (3M) v. EPA 17 F.3d 1453, (D.C. Cir 1994). The Court ruled that a five-year statute of limitations applies to all federal civil penalty cases, unless otherwise specified by Congress. The Court also ruled that a violation "clock" commences when the violation in question occurs. The article goes on to say that the implications of this case are being tested in enforcement cases where the fill often goes undetected for long periods of time, allowing the statute of limitations to run before an enforcement action can be filed. The wetlands case at issue is U.S. v. Renco, a Corps of Engineers enforcement case being brought on our behalf by the Department of Justice in the District Court in San Francisco against a land developer in the San Francisco Bay area. In view of the potential impact of the 3M case on other Corps enforcement cases, I felt it would be beneficial to discuss the holding in that case and present our arguments in Renco to illustrate how we might address that impact in other cases.

2. 3M v. EPA

The 3M case involved a review of EPA's assessment of civil penalties for violation of the Toxic Substances Control Act. In its decision, the Court of Appeals was required to interpret the terms of 28 U.S.C. 2462:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

In a decision not directly relevant to the Renco case but potentially relevant to future administrative fine actions we may choose to impose, the Court held that Sec. 2462 applies to civil penalty cases brought before agencies as well as to judicial proceedings. The Court went on

to hold that Sec. 2462 requires that an action, suit or proceeding to assess or impose a civil penalty must be commenced within five years of the date of the violation giving rise to the penalty, *not* five years from the date EPA reasonably could have been expected to detect such violations.

3. U. S. v. Renco Properties, Inc., et. al

This case is a civil enforcement action brought by the United States seeking injunctive relief and civil penalties against Defendants for violating the Clean Water Act at a 6.3 acre tract in Fremont, California, by discharging approximately 45,000 cubic yards of fill materials into wetlands during July and August of 1983. On April 10, 1985, Renco submitted an application for an after-the-fact permit for the fill. That permit was denied on April 1991. Renco was ordered to restore the wetlands on January 14, 1992. They refused. A complaint was filed on July 15, 1994. Renco has moved to dismiss the complaint, at least in part, based on 28 U.S.C. 2462.

The Government is responding to Renco's motion with three arguments. First, we are arguing that the statute of limitations was equitably tolled during the processing of Defendants' after-the-fact permit application. Secondly, we are taking the position that since the Defendants have not removed the unlawful fill in response to our restoration order, the violations are continuing. Thus the statute of limitations would not run as each day the fill remains in the ground constitutes a "new" violation for purposes of tolling the statute. Lastly, we are arguing that even if the United States' civil penalties claim were barred by 28 U.S.C. 2462, the United States would still be entitled to injunctive relief for restoration and mitigation.

4. IMPACT

I believe we have a good chance of winning at the District Court in the Renco case. Ninth Circuit cases support our argument that acceptance of an after-the-fact permit tolls the statute of limitations. There is also case law supporting our alternative argument that unremoved fill constitutes a continuing violation. Until we get a decision, there is no reason to assume we are incorrect. And of course, if we are willing to limit our relief to equitably ordered restoration, mitigation, and injunctions, the statute of limitations should not be a factor at all.

In those cases where it is appropriate to seek a fine, the easiest way to avoid the bar of 28 U.S.C. 2462 is the bring our action within 5 years of when we believe the violation first occurred. Even where we accept an after the fact permit application, five years should normally be sufficient to complete processing and either grant the permit or file a judicial action. However, even if we are not successful in our Renco litigation , there are reasonable steps we can take to avoid a statute of limitation problem. For example, in those situations where we discover violations relatively close to the five year limit based on the date of the actual discharge, we have the discretion to forgo the after the fact permit process where the need to expeditiously file a judicial action is present (see 33 C.F.R. 326.3(e)(1)(ii)). Moreover, in those cases where we accept an after the fact permit, long delays to enable the applicant to develop, or re-develop data and studies must be monitored and avoided in situations where we are coming close to the five year limit. A timely denial and the filing of a judicial action may be prudent, rather than giving the applicant

"one last chance" to come in and work with us. Alternatively, where District counsel determines it to be appropriate, the Corps can require that a violator sign a statute of limitations tolling agreement as a condition precedent to our accepting and processing an after-the-fact permit application. In such a tolling agreement the violator would clearly and explicitly agree to the tolling of the statute of limitations during whatever period of time the Corps takes to process the after-the-fact permit application. Of course, if a violator were to refuse to sign a proffered tolling agreement, the Corps could then determine that legal action is appropriate in accordance with 33 C.F.R. 326(e)(1)(ii).

5. SUMMARY

In summary, the 3M case raises some issues that we will have to monitor. If we are successful on both our arguments in the Renco suit, the damage of 3M should be minimal to enforcement of Sec. 404 violations. If we lose those arguments, we will have to carefully consider the question of appeal. However, even if such a loss were to stand, the impact should be limited to those cases where we seek a civil fine and we only recently become aware of an old violation almost five years old, or older, or where we allow an after the fact permit process to drag beyond five years of the date of the violation. However, careful monitoring of that situation should avoid any problems. We must also remember that 3M does not impact equitable relief, including restoration, mitigation, and injunctive relief.

Because this area of the law is unsettled, it might be prudent to take the steps set forth above, if possible, to avoid raising a statute of limitations argument. Where that is not possible, you might consider seeking only equitable relief. We will continue to monitor the situation and, working with the Regulatory Office, provide formal guidance if warranted. In the meantime, you are not prohibited in any way from bringing any type of enforcement action, so long as it is consistent with 33 C.F.R. Part 326.

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